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Guyora Binder

*University at Buffalo School of Law*

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# COMMENTARY

## On Critical Legal Studies As Guerrilla Warfare

GUYORA BINDER\*

*"[T]o be on the march is also a form of fighting, and to avoid combat at a given moment is another form." —Che Guevara<sup>1</sup>*

Critical legal studies represents the first systematic effort to gain legitimacy for leftist scholarship and teaching in American law schools. In an effort to deny that legitimacy, more conservative scholars and public officials have begun to characterize critical legal studies as dangerous,<sup>2</sup> potentially violent,<sup>3</sup> and on at least one occasion, as a form of "guerrilla warfare."<sup>4</sup> Skeptical that the quest for legitimacy is consistent with true radicalism, some leftist lawyers and scholars have begun to complain that critical legal studies is harmless and ineffectual.<sup>5</sup>

Because these criticisms are contradictory, they pose exactly the sort of intellectual problem we critical legal scholars most like to think about: How is it possible that these contradictory characterizations of critical legal studies can both seem true? On the other hand, these criticisms pose exactly the sort of political problem that we critical legal scholars don't like to think about: Are we in fact so dangerous to the social order that we will be squashed? Alternatively, is the price of our survival our complete co-optation by the social order? This essay attempts to answer these questions. It offers an account of critical legal studies that incorporates both contradictory characterizations. It argues that even if critical legal scholars are not quite the guerrillas that its more conservative critics fear, critical legal studies nevertheless is more like guerrilla warfare than skeptics on the left will allow.

What does the phrase "guerrilla warfare" call to mind? Latin American peasants, bandolier-swaddled and barefoot, bayonets clenched between their teeth, carrying rusty muskets down rain-forested ravines to torch *haciendas*, determined, whether by the sword or the plow, to live off the land. Of course

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\* Professor of Law, State University of New York at Buffalo. A.B. 1977, Princeton; J.D. 1980, Yale. This essay benefited from the comments and suggestions of Alan Freeman, George Kannar, Errol Meidinger, Betty Mensch, Judy Olin, John Schlegel, and, especially, Rob Steinfeld. Errors of fact and politics are mine alone.

1. CHE GUEVARA SPEAKS 88 (G. Lavan ed. 1967). Che Guevara has also published under the name of and is often referred to as Ernesto Guevara.

2. Eastland, *Radicals in the Law Schools*, Wall St. J., Jan. 10, 1986, at 16, col. 4.

3. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 437-38 (1984).

4. "[M]ore traditional professors . . . contend that the faculty 'crits' are waging 'guerilla warfare' at the law school." Lacayo, *Critical Legal Times at Harvard*, TIME, Nov. 18, 1985, at 87.

5. See *infra* notes 10, 12-13 (criticizing ineffectiveness of critical legal studies).

the CIA can train the cast of *Miami Vice* to do this sort of thing, but ordinarily we will think of a leftist insurgency carried on by, you know, "the masses." Roberto Unger evoked this kind of imagery when he characterized critical legal studies as a social "movement exemplifying a form of transformative action . . . ."<sup>6</sup> Yet most readers familiar with this "movement" attributed Unger's romantic characterization to revelation—a research method at which he is adept<sup>7</sup>—rather than observation.

By contrast, what does the phrase "critical legal studies" conjure up for most of us? Leftists, to be sure, but hardly "the masses." Critical legal scholars are privileged people and graduates of elite institutions by and large. They can afford to lavish attention upon their toddlers and their therapists and to wear the most expensive clothes they feel comfortable in. They would sooner unpack a premise than pack a pistol. They publish rather than perish. They have a high rate of literacy. Have they anything in common with rugged hillfolk beyond a taste for goatcheese? Some would say that likening oppressed *campesinos* to these spoiled yuppies only adds insult to injury.

That is not to say that the guerrillas of our video imagination are disqualified by graduate degrees. Twenty years ago, the psychedelic visage of Che Guevara, brooding through the purple haze, was a ubiquitous reminder that there *were* leftist intellectuals willing to lay down their lives for a cause. In his highly literate essays and speeches, Guevara stressed the importance of the practical activity—and the risk—of collective armed struggle as a prerequisite to the personal transformation necessary for citizenship in the new society. "The revolutionary makes the revolution," ran one of his aphorisms, "and the revolution makes the revolutionary."<sup>8</sup> Guevara's theory of revolutionary change commanded unusual political credibility, because it impelled him to action and risk on behalf of others.<sup>9</sup> At the same time it commanded

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6. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 665 (1983). *But see infra* text accompanying note 38 (revolution unlikely in industrialized West).

7. *See* R. UNGER, KNOWLEDGE AND POLITICS 295 (1975) ("But our days pass, and still we do not know you fully. Why then do you remain silent? Speak God.").

8. *The Philosophy of Che Guevara* (Center for Cassette Studies 1965) (taped interview with Che Guevara), *quoted in* S. LISS, MARXIST THOUGHT IN LATIN AMERICA 259 (1984). For examples of Guevara's thinking on the relationship between armed struggle and political transformation, see C. GUEVARA, GUERRILLA WARFARE (1985) (collection of essays by Guevara and others); C. GUEVARA, SOCIALISM AND MAN IN CUBA AND OTHER WORKS (1968) [hereinafter C. GUEVARA, SOCIALISM]. For a brilliant, imaginative reconstruction of Guevara's own personal transformation, see J. CANTOR, THE DEATH OF CHE GUEVARA (1983) (novel quoting extensively from Guevara's Bolivian diaries). A useful introduction to Guevara's thought in its indigenous context is provided in S. LISS, *supra*.

9. "I believe in armed struggle as the only solution for those peoples who fight to free themselves, and I am consistent with my beliefs. Many will call me an adventurer, and that I am—only one of a different sort, one of those who risks his skin to prove his truths." CHE GUEVARA SPEAKS, *supra* note 1, at 142 frontispiece.

unusual intellectual credibility because it was rooted in experience. It was, in this sense, empirically tested.

Recently, the political and intellectual credibility of critical legal studies has been questioned precisely because it lacks these attributes. This criticism often comes from lawyers and legal scholars who share some of the discontent expressed by critical legal scholars.

One frequently voiced complaint is that critical legal scholars, while complaining that their society is fundamentally unjust, do nothing to change it. Few of the scholars most prominently associated with critical legal studies engage in litigation, organize communities, develop legislative proposals, or advise campaigns.<sup>10</sup> Their law review articles seldom offer novel legal arguments usable in court, specific policy proposals, or even vague prescriptions for a better society. So much is true of subway graffiti, which comes in for more than its fair share of criticism;<sup>11</sup> but what makes the handiwork of critical legal scholars so much more galling is that they have so much less than subway artists to complain about, while being so much better positioned to do something about their complaints. After all, they belong to a profession that has traditionally wielded considerable influence and sometimes sought to achieve social reform by legal means. A recent piece in the *New Republic* suggested that critical legal scholars might be worse than useless: Not only do they do little to redress inequality, but as relatively privileged members of society, they may be part of the problem.<sup>12</sup> These suspicions are regularly grumbled by the underpaid public interest lawyers invited to critical legal studies conferences for the purpose of allaying such suspicions.<sup>13</sup> When Duncan Kennedy, the Grand Dragon of critical legal studies, decided to spend his sabbatical year teaching at a less established law school and counseling indigent clients, cynics imagined that he was more concerned with public relations than with the public interest.

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10. Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 238 (1984); Schwartz, *supra* note 3, at 421; Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 552-67 (1984).

11. Glazer, *On Subway Graffiti in New York*, 54 PUB. INTEREST 3 (1979) (criticizing graffiti as manifestation of uncontrolled behavior and evaluating proposals for controlling graffiti).

12. Menand, *Radicalism for Yuppies*, NEW REPUBLIC, Mar. 17, 1986, at 20, 23. For a commentary cast in a less ingenuous vein, see Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 264 (1984) ("The obvious Marxist explanation of the CLS movement is that it permits a few harmless academic leftists to adopt a radical pose, while receiving good salaries and excellent fringe benefits for serving the interests of the capitalists."); White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 671-72 (1984) (asserting that self-preservation retards transformative process).

13. Some of the tensions between legal academics and public interest practitioners, evident at any critical legal studies meeting, are alluded to in Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 399-402, 410 (1984), as well as in Sparer, *supra* note 10, at 511.

If the Critics<sup>14</sup> political credentials have sometimes been questioned by leftist lawyers, their intellectual credentials have sometimes been questioned by other leftist scholars. Many have complained about the legal doctrine that dominates the attention of most legal scholars, but some skeptics have noted that the Critics are just as inclined as conventional legal scholars to overestimate the importance of legal doctrine.<sup>15</sup> The three complaints about legal doctrine most often associated with critical legal scholars are that it's indeterminate, that it's a tool for legitimating injustice, and that it's ideological. Skeptics on the left (hereinafter the "left skeptics") have questioned all three of these complaints.

By arguing that legal doctrine is indeterminate, Critics mean that it cannot decide cases—that its rules, when applied to controversies, do not compel determinate results.<sup>16</sup> To this claim, Marxist sociologists of law have responded that the legal rules of a capitalist society quite predictably advance the interests of its ruling class.<sup>17</sup> That a lawyer can always come up with a clever argument doesn't change the fact that a regime of private property protects the interests of property owners. While legal doctrine may not logically compel particular results, in its social context it may yield predictable results.<sup>18</sup> Legal doctrine, then, is essentially determinate since it is determined by class interest.

14. I use "Critics" or "Critical" to refer to critical legal scholars or to characterize their principles and ideas. I use "critics" or "critical" to refer to those who criticize critical legal scholars.

15. See Munger & Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment On Method*, 6 LAW & POL'Y 257, 260-79 (1984) (explicit parallel between conventional legal scholarship and critical legal studies); cf. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 576, 579-88 (1984) (discussing debate over value of empiricism).

16. See Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 377-79 (1973) (criticizing attempts to legitimize coercive power of judges).

17. See Schlegel, *supra* note 13, at 397 (citing alliance between critical Marxism and scientific Marxism since both stress that material culture emphasized in determining content of law). This viewpoint is frequently attributed to M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) and G. KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963).

18. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 53 U. CHI. L. REV. 462, 484-88 (1987). Of course it is not clear whether this predictability of legal decisionmaking is attributable to legal doctrine rather than to the social context in which we find it. Moreover, it is not always clear that the legal decisionmaking has a predictable impact on the world rather than a predictable impact on the way the world is described. If the latter, then the claim that property law protects the wealthy is a tautology rather than an empirical judgment. As Robert Gordon argues, "Banality becomes pure tautology when the functionalist claim is reduced to one that the legal system responded to the needs of capitalism with rules securing to individuals large bundles of exclusion/exploitation/alienation rights that could be traded in markets because such a legal regime is one of the main characteristics most people use to *define* capitalism." Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 82-83 (1984) (emphasis in original). If legal decisionmaking serves more to describe rather than create the distribution of wealth, then the strongest claim that one can make for its service to the interests of the wealthy is that it legitimates their wealth by calling it property.

In saying that legal doctrine is indeterminate, Critics do not mean that it makes no difference. To the contrary, they seem to think that legal doctrine is very important. They think that legal doctrine helps perpetuate injustice by providing justifications for it. This is how many people have understood the Critics' complaints that legal doctrine "legitimizes" injustice.<sup>19</sup> In a recent article,<sup>20</sup> however, Marxist labor law scholar Alan Hyde argues that such claims lack empirical support: opinion polls, he notes, belie the claim that people disadvantaged by the legal system perceive it as just.<sup>20</sup>

A Critical defense of the legitimization thesis would surely involve broadening its focus. Legal doctrine, the Critic might say, perpetuates injustice not by increasing popular support for the legal system per se, but by helping to maintain allegiance toward the society as a whole. It does this, the Critic would argue, by invoking and honoring values widely, and falsely, attributed to that society. In other words it is one expression, but by no means the sole source, of a hegemonic or all-pervasive ideology.<sup>21</sup> Thus, even if some people perceive the courts as failing to live up to the ideals enunciated by legal doctrine, their perceptions of the courts as unfair may be etched against a background image of a fundamentally fair society: for example, "everybody knows the courts are owned by (the rich, the landlords, the welfare department, the cops, the whites); you can't expect them to listen to a poor (schmuck, screw-up) like me." If some empirical studies have shown that deprived people mistrust the courts, other empirical studies have shown deprived people mistrusting themselves, blaming themselves for their own deprivation.<sup>22</sup> Predictably, though, no such empirical studies have been performed by critical legal scholars.<sup>23</sup>

Because the notion of hegemonic ideology employed by critical legal schol-

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19. E.g., Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049, 1049-57 (1978).

20. Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 406-12.

21. See Gordon, *supra* note 18, at 109-24 (evaluating historical evidence that laws shaped by ideology); Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 281, 284-92 (D. Kairys ed. 1982) (same).

22. See generally O. LEWIS, *LA VIDA* xiii-liv (1966) (describing "culture of poverty"); E. LIEBOW, *TALLY'S CORNER* (1967) (unemployed lower economic class blames itself for poverty); R. SENNETT & J. COBB, *THE HIDDEN INJURIES OF CLASS* (1973) (analyzing psychological response of working class to life situations).

23. Some work in social history that has influenced critical legal studies is empirical: for example, E. GENOVESE, *ROLL, JORDAN, ROLL* (1972); Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 113 (1975); but it would be disingenuous to claim this work as critical legal study. Some work by critical legal scholars has offered phenomenological description of the psychic effects of power: for example, West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); P. Gabel, *Ontological Passivity and the Constitution of Otherness Within Large-Scale Social Networks: The Bank Teller* (1981) (unpublished manuscript); but such work has seldom presented empirical support for its claims, even in the form of personal experience.

ars has not emerged from empirical study, some otherwise sympathetic scholars have suspected that it is conceptually fuzzy. In a recent article, liberal legal scholar Don Brosnan compared critical legal studies unfavorably to recent Marxist theory, arguing that the work of critical legal scholars generally fails to explain how ideological false consciousness is produced by, or otherwise related to, material conditions.<sup>24</sup> Because they fail to explain how false consciousness arises, critical legal scholars cannot explain how it can be eliminated. To the extent that such "ideology" is "hegemonic," it seems even more unassailable. If "ideology" deludes everyone in our society, how is a critique of ideology possible? The difficulty this poses for radical scholars is political as well as intellectual: If ideology sustains an unjust society, to the extent that that ideology is invincible, eliminating injustice seems impossible. It is difficult to maintain a posture as a radical scholar without believing in the possibility of radical social change. Brosnan has suggested that the Critics' lack of a theory of radical social change may explain their failure to offer or implement a concrete program.<sup>25</sup> In a similar vein, Canadian observers Alan Hutchinson and Patrick Monahan speculate that the lack of a psychological theory of personal transformation hobbles the Critics in designing any transformative practice.<sup>26</sup> Perhaps the Critics fail Guevara's standard for political activism because they lack his theory of social change—although Guevara, no doubt, would have reversed the causation. Good theory, he might have said, looks into the barrel of a gun.

The manifest differences between Che Guevara and, say, Mark Kelman<sup>27</sup> make it all the more interesting that some observers *have* likened critical legal studies to guerrilla warfare. While leftists of various hues have scored critical legal scholars for making so little difference, conservatives—and even liberals—have seen them as downright dangerous.<sup>28</sup> To some, their rise to

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24. Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 259, 262-68 (1986).

25. *Id.*

26. Hutchinson & Monahan, *supra* note 10, at 239-42. Hutchinson and Monahan suggest that developing individual autonomy requires relations of intimacy that capitalism impedes, but they offer no suggestions for a practice aimed at transforming either capitalist social conditions or the hobbled personalities that inhabit those conditions. Guevara, by contrast, offers guerrilla warfare as a practice aimed at disrupting those conditions while developing both the personal autonomy and collective commitment of the practitioners. For further discussion of models of personal and social transformation compatible with critical legal studies, see Binder, *Beyond Criticism* (forthcoming in Summer, 1988, *University of Chicago Law Review*).

27. "I never really claimed to be a good organizer anyway; in fact, I suspect that I'm a lousy one. I actually believe that the crudest Marxist sociology can adequately account for that: I am an isolated bourgeois academic, removed from daily struggles, etc. etc." Kelman, *Trashing*, 36 STAN. L. REV. 293, 346 (1984).

28. Schwartz, *supra* note 3, at 437-39 (critical legal studies endorses coercion and violence); *id.* at 448-52 (critical legal studies makes irresponsible proposals); *id.* at 454 (critical legal studies endorses violence).

prominence has heralded the collapse of the rule of law,<sup>29</sup> Western civilization,<sup>30</sup> and—worst of all—the Harvard Law School.<sup>31</sup> One of the most controversial of these Jeremiads was by Dean Paul Carrington of the Duke Law School. In his eyes, critical legal scholars are insurgents, undermining the mission of the law schools from within and corrupting the characters of incipient lawyers. What makes his characterization of the problem so interesting is his proposed solution to it. Critical legal scholars, he opined, have a moral duty to depart the law school, to attack it from without.<sup>32</sup> Thus he objects less to the Critics' attack on legal doctrine than to what he perceives as their surreptitious way of waging it. This objection is reminiscent of the complaints made by imperial officers that native rebels don't fight like gentlemen because they disdain uniforms and hide behind trees. To "hide" among a population that an occupying army is determined not only to civilize, but also to "civilianize," has always seemed to Westerners as the depth of cowardice. This hiding is said to be one of the distinguishing features of terrorism—and of guerrilla warfare.<sup>33</sup>

Thus the skeptics of both the right and the left seem to agree on two features of critical legal studies: that it is cowardly, and that it is deceptive. According to the left skeptics, critical legal scholars posture as dangerous revolutionaries while remaining harmless, safe, and well fed. According to skeptics on the right, critical legal scholars posture as harmless laborers in the vineyards, while secretly being dangerous revolutionaries. What are we to make of all this?

29. Eastland, *supra* note 2.

30. H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 33-41 (1983) (legal formalism and distinction between law and politics essential to Western legal tradition; attacks on these ideas, especially as articulated by Roberto Unger, symptomatic of breakdown of this tradition); *id.* at 590 n.88 (Duncan Kennedy's interpretation of contract doctrine in terms of conflict of irreconcilable values symptomatic of collapse of Western legal tradition). *But see* Binder, *Angels and Infidels: Hierarchy and Historicism in Medieval Legal History*, 35 *BUFFALO L. REV.* 527-30 (1986) (describing and criticizing Berman's analysis of critical legal studies).

31. *See* Lacayo, *supra* note 4, at 87 (discussing difficulty in recruiting professors at Harvard Law School because of political infighting).

32. *See* Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222, 227 (1984) ("nihilism," as exemplified by Roberto Unger and others in critical legal studies movement, could encourage future lawyers to engage in bribery and intimidation; nihilists "have an ethical duty to depart the law school"). Louis Schwartz expresses a similar sentiment: "Every faculty should have one Kennedy—certainly no more than one and most certainly not one of the solemn acolytes." Schwartz, *supra* note 3, at 419. *But see* "Of Law and the River," and *Of Nihilism and Academic Freedom*, 35 *J. LEGAL EDUC.* 1, 19-20 (1985) (letter from Louis B. Schwartz to Paul Brest) (disclaiming implication that number of nihilist professors should be restricted other than for reasons of academic qualifications). Interestingly, when Brest characterized Carrington's position as a threat to academic freedom, Philip Johnson objected that Brest was effectively hiding behind the liberal principle repudiating political tests for academic employment, which Johnson assumed critical legal scholars had rejected. *Id.* at 16-17 (letter from Paul Brest to Philip E. Johnson); *id.* at 18-19 (letter from Phillip E. Johnson to Paul Brest).

33. J.T. JOHNSON, *THE JUST WAR TRADITION AND THE RESTRAINT OF WAR* 66-69 (1981)



I argue here that both of these characterizations are largely correct, but that there is more truth than justice in them. In other words, I admit here that there is much timidity and equivocation in critical legal studies, but nevertheless I defend critical legal scholars. In particular, I argue that leftist scholars and practitioners have unfairly attacked critical legal studies because they have been successfully deceived as to the true intentions of critical legal scholars—more deceived than right-wing opponents of critical legal studies have been. I admit that this deception is the product of excessive caution on the part of critical legal scholars, but I defend that caution as excusable under the circumstances. Because left skeptics have not understood how potentially dangerous critical legal studies could be to the status quo, they have also not seen how dangerous the status quo could be to critical legal scholars.<sup>34</sup>

Let me review the left skeptics' characterization of critical legal studies, and then explain how I think that characterization is mistaken. The left skeptic complains that critical legal scholars fail as leftist intellectuals because: (1) they do no empirical research into the origins of injustice; (2) (as a result) they have no theory of social change; (3) (as a result) they have no political program; and, (4) (as a result) they engage in no political activity (which in turn precludes opportunities for empirical observation). I argue, by contrast, that critical legal scholars: (1) have a theory of social change; (2) (that is) sufficiently rooted in experience; (3) (that they) implement; but only (4) to the extent that its implementation involves little risk.

What is the theory of social change that I attribute to critical legal studies? It is essentially the same theory of social change that I outline at the beginning of this essay, and that I attribute to Che Guevara: Social change can only be achieved through confrontation—that is, a collective commitment to risk repressive violence, either through disobedience or violent resistance.<sup>35</sup>

Now, the analogy that I propose between critical legal studies and guer-

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34. Despite the relatively low tenure standards of American law schools, an alarming number of impressive critical legal scholars are being fired from law teaching positions. See generally Gordon, *Law and Ideology*, 3 *TIKKUN* 14 (1988) (recent firings at Harvard, New England, and Rutgers-Camden).

35. Guevara advocated the operation of mobile guerrilla bands in rural areas, anticipating that their operation would provoke indiscriminate repressive violence throughout the region. "The dictatorship constantly tries to function without resorting to force. Being obliged to appear . . . in its true aspect as a violent dictatorship of the reactionary classes will contribute to its unmasking, and this will deepen the struggle to such an extent that it will not be able to turn back." CHE GUEVARA SPEAKS, *supra* note 1, at 82. While the repressive violence would convince the peasants that they had little to lose by resisting, the courage and success of the guerrillas would convince them that they had much to gain. Guevara "knew that Latin Americans saw the objective conditions for revolution—poverty, hunger, oppression—and believed that the subjective conditions—cognizance of the possibility of victory—could emerge only by engaging in armed struggle." S. LISS, *supra* note 8, at 258.

rilla movements is open to misconstruction. After all, critical legal scholars don't even seem militant, let alone military. And even on the assumption that Critics believe or engage in civil disobedience, the reader may fairly object that nonviolent resistance is not violent resistance. Am I really suggesting that critical legal studies intends to change society by putting a gun to its head? Do critical legal scholars really wish to seize the state apparatus by armed force? Yet the analogy to guerrilla movements will seem strained only if the reader is unwilling to accept the limitations I impose upon it or to accept my idiosyncratic interpretation of guerrilla movements. So before comparing critical legal studies to guerrilla movements, I should clarify what I am *not* saying about critical legal studies, what I am assuming about guerrilla movements, and why I am willing to court misconstruction by comparing the two. Accordingly, lest I appear to be marketing critical legal studies under false pretences, I offer these warnings on the label.<sup>36</sup>

First, I am not saying that critical legal studies is guerrilla warfare. All I am saying is that the two practices share the same theory of social change. And, according to this theory, warfare is not always an appropriate means of pursuing social change. As Sheldon Liss comments, Guevara "realized that where a government had come to power through any form of popular consultation, fraudulent or not, and maintained at least a facade of constitutionality, it is exceedingly difficult to precipitate a civil war since the possibilities for civil struggle have not been exhausted."<sup>37</sup> Roberto Unger agrees that armed revolution is unlikely in the industrialized West, because "mass-party politics" and mass culture obscure conflict, and because "brutal tyrannies" which might provoke universal resistance "do not exist in the industrialized West," while the "repressive apparatus" of the state is unlikely to be disrupted by military conflict with other states. "As the mechanisms and occasions of revolution disappear, we seem to be left with nothing but the petty squabbles of routine politics."<sup>38</sup>

Now the mere fact that guerrilla warriors and critical legal scholars may agree that guerrilla warfare is inappropriate in the industrialized West does not mean that the two groups share a theory of social change. It may be that guerrilla warriors would view their own theory, as well as their own practice of social change, as inapplicable in Western society; and it may be that critical legal scholars seek to develop a theory of social change peculiar to Western society. Thus third world revolution is commonly identified in American popular culture with the coup d'état—an attempt on the part of a military band to seize control of the apparatus of the state by force—while critical legal scholars such as Unger reject a conception of politics "narrowly under-

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36. And not in fine print, either.

37. S. Liss, *supra* note 8, at 261.

38. Unger, *supra* note 6, at 670-71.

stood as the contest over the control of the state.”<sup>39</sup> Accordingly, a reader who shares the popular image of guerrilla movements described above will have difficulty accepting the suggestion that critical legal scholars and guerrilla warriors share even a theory of social change.

In consequence, I offer a second warning on the label “guerrilla warfare.” In using this term, I reject its popular association with the coup d’etat.<sup>40</sup> Accordingly, I do not see guerrilla warfare as premised on the assumption that control of the state is a necessary precondition to social change. In addition, I see violence as playing a secondary role in the guerrilla’s theory of social change and coercion next to no role at all.

Although willing to fight, Guevara did not believe that meaningful social change could be accomplished through coercion. Rather, it would only occur through the personal transformation and collective commitment of the masses. Thus the primary goal of the guerrilla movements he envisioned and inspired<sup>41</sup> was not to seize the apparatus of the state—indeed, this goal, if realized prematurely, would involve no meaningful social change at all<sup>42</sup>—but to politicize ordinary people and inspire them with the courage to resist.<sup>43</sup>

Guerrillas inspired by Guevara expected to transform ordinary people in four ways. First, by living among oppressed people and sharing their poverty, the guerrillas hoped to encourage such people to respect and identify with the guerrillas. Second, by offering assistance—medical care, help at harvest time, famine relief, land reform in regions they controlled—the guer-

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39. *Id.* at 672.

40. This perception of guerrilla movements in American popular culture is a direct reflection of the way American officials portray these movements. See Loveman & Davies, *Introduction: Revolutionary Theory and Revolutionary Movements in Latin America*, in C. GUEVARA, *supra* note 8, at 20-21 (American officials characterize such movements as “international vandalism,” “threats” to the “national independence” of third world countries, and warn of the consequences for world peace if successful guerrilla movements are accepted as legitimate governments). By contrast, Guevara is at pains to distinguish popular guerrilla movements emanating from “the masses” from reformist coups d’etat that eliminate a repressive leader without democratizing the structure of power. Guevara, *Guerrilla Warfare: A Method*, in C. GUEVARA, *supra* note 8, at 189-90; see Guevara, *Message to the Tricontinental*, in C. GUEVARA, *supra* note 8, at 207 (distinguishing popular upheavals from army putsches).

41. Guevara influenced guerrilla movements in Latin America through his writings, particularly *Guerrilla Warfare*, by the example he set with his exploits during the Cuban revolution, his personal involvement in guerrilla movements (as in Bolivia in the mid-1960s), and, possibly, by his training of guerrilla leaders. See generally Loveman & Davies, *Case Histories of Guerrilla Movements and Political Change*, in C. GUEVARA, *supra* note 8, at 214 (discussing Latin America guerrilla movements). For a discussion of Guevara’s influence on the Sandinista movement, see *id.* at 353, 359, 362-65.

42. See Loveman & Davies, *supra* note 41, at 405 (emphasizing creating conditions for revolution rather than simply setting goal of military victory by Salvadoran guerrillas).

43. Loveman & Davies, *supra* note 41, at 404 (assessing Salvadoran guerrillas); Loveman & Davies, *supra* note 40, at 4-5 (assessing Guevara).

rillas hoped to win the trust and friendship of victims of government neglect or repression.<sup>44</sup> Third, by attacking the government while remaining an elusive target, the guerrillas anticipated that they would provoke further government repression against the populace. The guerrillas hoped that such government repression would further alienate the populace from the government and would persuade the people that they had little to gain by acquiescing in their own oppression.<sup>45</sup> Finally, by surviving government repression, the guerrillas hoped to win the people's admiration and to persuade them that self-defense need not be as costly as they feared.

Guevara dared guerrillas to gamble that identification with and admiration for their struggle, fear and hatred of a repressive government, and, perhaps, a sense of little to lose, would impel some of the oppressed to join the guerrilla movement. The experience of risking one's life for a cause while obeying the guerrilla's code of service to the people would, according to Guevara, forge a new socialist humanity.<sup>46</sup> Violent resistance was for Guevara what nonviolent resistance was for Gandhi—a quasi-religious discipline requiring humility aimed at self-transcendence.<sup>47</sup> The resulting revolution would take place neither on the battlefield nor on the books, but in the hearts and minds of the revolutionaries. As a consequence, risk and commitment were more important in Guevara's theory of social change than violence or coercion.

Although Guevara's program obviously involves using violence against the government, the premise of the program is that violence is not introduced by the guerrillas. Rather, Guevara presupposes that an oppressive state survives only by threatening or employing violence all the time; armed resistance is thus a form of legitimate self-defense.<sup>48</sup> The most coercive, exploitative aspect of this program consists of its willingness to provoke repressive violence against others in order to compel a choice; however, even then the program compels a choice between two sides rather than adherence to one or the other.

Moreover, this same coercive situation can result from "nonviolent" strategies and can contribute to their success in inspiring further resistance. Society is so constructed that no one can make herself a target of repression

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44. C. GUEVARA, *supra* note 8, at 65, 79-80, 129; Loveman & Davies, *supra* note 41, at 286 (philosophy of guerrillas in Colombia).

45. C. GUEVARA, *supra* note 8, at 127 (acknowledging that repressive measures impoverish peasantry); Guevara, *supra* note 40, at 186-87 (violence provokes repressive government to drop its mask of legality); Loveman & Davies, *supra* note 41, at 227, 377, 381 (repressive counterinsurgency measures in Guatemala and Nicaragua built support for guerrilla movements).

46. See Loveman & Davies, *supra* note 40, at 7, 11.

47. C. GUEVARA, *SOCIALISM*, *supra* note 8, at 79.

48. Guevara, *supra* note 40, at 187; Loveman & Davies, *supra* note 40, at 16 (quoting Venezuelan guerrilla Douglas Bravo); Loveman & Davies, *supra* note 41, at 278 (quoting Tenth Congress of Colombian Communist party).

without endangering those physically, emotionally, or politically closest to her. Granted, the nonviolent resister courageously presents herself as a target for repression rather than melting into the crowd, but can she evade responsibility when witnesses to her bravery become victims of repression as well? And while she may prefer that these victims join her in martyrdom, can she express surprise when they raise their hands in self-defense? I do not equate guerrilla warfare with civil disobedience, but I do insist that violence is less central in theory to the former and more important in practice to the latter than is commonly supposed.

I am aware that the understanding of guerrilla movements I ask the reader to accept is unconventional, and, as a consequence, my comparison of critical legal studies with the theoretical foundation for guerrilla warfare almost invites misinterpretation. Accordingly, this comparison requires a third warning: I make this comparison in order to make a point about guerrilla warfare as well as about critical legal studies. I identify the two not only in order to suggest that critical legal studies is more engaged and subversive than is commonly supposed, but also to present guerrilla movements as worthy of more respect than they are commonly accorded. In particular, I wish to show that guerrilla movements share much with popular movements for social change that have been accepted as legitimate in this country, and that their participants act on the basis of beliefs shared by eminent scholars in this country. I stress this point because I believe that the popular image of guerrilla movements as coercive rather than persuasive is not only wrong but also destructive. In particular, it is destructive of popular social movements abroad in so far as it justifies coercive repression of these movements as a routine response in kind, within a squabble between military elites or their superpower supporters. Even if we critical legal scholars are unable to raise our hands in defense of such movements, we must raise our voices. No doubt we could credibly preserve our own respectability by distinguishing ourselves from violent movements for social change, just as we have (although somewhat less credibly) sought respectability by maintaining a cautious distance from Marxism. Unfortunately, the price of such respectability may be paid by Marxist popular movements abroad. These movements are faced with brutal repression in part because they lack legitimacy within our culture, while law professors can probably afford to shed a little of the legitimacy our culture accords us.

Now this is not meant to imply that the analogy I am drawing between critical legal studies and guerrilla warfare is nothing more than a rhetorical posture—a gesture of support for revolutionary struggles in Central America or South Africa. Within the limits and accepting the assumptions I have stated, there is a great deal of truth in the analogy. Granted, critical legal scholarship concerns civil rather than military struggle, yet such scholarship

often implies that civil struggle is futile, its possibilities exhausted.<sup>49</sup> Despite the difference in terrain and rhetoric, the writings of critical legal scholars, like the efforts of Guevara, point toward confrontation with its attendant risk of repressive violence. The major difference is that critical legal scholars seem unwilling to take the risk. They are "Guevarists" but not Guevaras, "guerrillists" but not guerrillas.

"But," the left skeptic will respond, "what you are dismissing as the 'only difference' between critical legal scholars and Che Guevara is a mortal difference! What gave Guevara's theory intellectual as well as political credibility was that he insisted on testing it in practice, whereas our skepticism about critical legal studies is based on its lack of empirical support. Because of this lack of empirical support we are also skeptical that the Critics' critique of legal doctrine really is tied to any theory of social change."

My response is twofold. First, critical legal studies is rooted in experience—that is, the particular historical experience of the generation that produced it. Second, critical legal studies requires little empirical support because it bases its theory of social change on assumptions widely prevalent in our political culture.

What do I mean by saying that critical legal studies is rooted in the historical experience of the generation that produced it? I mean that it has been profoundly shaped by participation in, or (more often) observation of, three political movements: the civil rights movement of the early and mid-sixties, the antiwar movement of the late sixties and early seventies, and the black power movement of the same era. I do not include the still vibrant women's movement as a principal source of critical legal studies, even though it has influenced the thinking of many (mostly female) critical legal scholars, for reasons I explore below.

The civil rights movement of the early sixties relied heavily on legal strategies. Even though it employed civil disobedience as a tactic on many occasions, an important purpose of such civil disobedience was to precipitate court tests of legislation, official policy, or semi-official custom. The civil rights movement aimed primarily, though not exclusively, at changing the law—at establishing or protecting civil rights. The civil rights movement was not concerned only with legal status; it also protested against poverty and

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49. Compare Freeman, *supra* note 19 (analyzing limits of civil litigation as tool for promoting social justice) and Freeman, Book Review, 90 YALE L.J. 1880 (1981) (reviewing D. BELL, *RACE, RACISM AND AMERICAN LAW* (1980)) (noting failure of civil rights law in achieving substantive results) with Unger, *supra* note 6 (celebrating the potential for advancing social change of doctrinal argument that extends the premises of liberalism to their limits). The ambiguity of critical discourse on this issue is illustrated by Duncan Kennedy's claim that "it looks like it's trench warfare for decades." Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 54 (1984). Does this mean civil struggle ("in the trenches" of bureaucratic institutions) for decades, or confrontation and violence ("warfare") for decades?

hunger.<sup>50</sup> Nevertheless, its most dramatic moments highlighted struggle over rights rather than resources.<sup>51</sup>

In thus characterizing the civil rights movement I recognize that rights and resources are not logically distinguishable—that is, resources can be distributed or protected by regimes of rights. The distinction I am making—and that the civil right movement made—was one of tone, of rhetoric, of symbolism. The civil rights movement, in the main, clothed the struggle over economic resources in judicial garb.

There was an excellent tactical reason for doing so. The leaders of the civil rights movement were convinced, as were many people in American society, that blacks could never achieve material or political advancement in American society without the support of whites, particularly elite whites.<sup>52</sup> They calculated that legal imagery and rhetoric would appeal more to wealthy and powerful whites than a simple demand for redistribution of wealth and power from whites to blacks.

And they were right. The civil rights movement succeeded in capturing the imagination of elite whites for two reasons: First, it relied on an image of consensus; second, it portrayed that consensus in a way flattering to elite whites.

By characterizing the struggle for black empowerment as a matter of equal justice rather than particular interest, the civil rights movement called for consensus rather than conflict. In the special circumstances of post-war America, this was brilliant strategy. World War II had ended a decade of intense social conflict by artificially imposing the unity required for national mobilization. In the wake of the war, American public culture required the continuation of that unity. As Gary Wills has argued, America had fallen in love with "total war."<sup>53</sup> The nation maintained the state of mobilization by shifting its enmity from fascism to communism, but this was simply one as-

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50. M.L. KING, *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 23-47 (1968) (process of civil rights movement is power through self-respect); H. SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY: 1954-1980*, at 220 (1981) (detailing plans for 1968 march on Washington highlighting economic injustice).

51. See H. CRUSE, *REBELLION OR REVOLUTION* 156-167, 238-240 (1968) (discussing dispute between W.E.B. DuBois and Booker T. Washington over whether black movement should aim primarily at obtaining economic success or legal rights); F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 207, 255-57 (1977) (questioning whether black advances in electoral and educational rights can improve conditions of poor Southern blacks).

52. F. PIVEN & R. CLOWARD, *supra* note 51, at 231-34 (channeling of civil rights movement by Kennedy administration); A. WASKOW, *FROM RACE-RIOT TO SIT-IN* 261 (1966) (fear among some blacks that race riots would threaten early achievements of civil rights movement).

53. G. WILLS, *LEAD TIME* 230-31 (1983); G. WILLS, *THE KENNEDY IMPRISONMENT* 276-77 (1982); G. WILLS, *CONFESSION OF A CONSERVATIVE* 208 (1979). For Wills' description of the rise of the culture of conformity in America in the wake of World War II and the impact of that "culture" on intellectual life in the universities, see Wills, *Beyond Left and Right*, in *NIXON AGONISTES* 558-75 (1970).

pect of an entire culture of conformity. The role of world leader, the rise of broadcast communication, the popularization of psychology, all contributed to an increased awareness of public image and an increasingly shared image of the normal. In this cultural climate, it was not only possible but necessary for black leaders to claim to represent a national consensus rather than a particular interest group. In the wake of World War II, obedience to consensus was a cultural imperative, and the rhetoric of equality in which black leaders couched their demands neatly suited the conformist tenor of the times.<sup>54</sup> The civil rights movement accordingly was “civil” in two senses: it addressed whites with polite respect, and it called upon whites to conform to a new ethic of citizenship.

But the civil rights movement was not just “civil”; it was also a movement for legal rights. By calling for a national consensus manifested through law, the civil rights movement suggested that consensus appropriately ought to be defined and administered by experts. This suggestion resonated with the authoritarian and “scientistic” strands of post-war American culture, but it held particular appeal for those members of elites who could envision themselves in the role of expert. The civil rights movement had tremendous appeal for educated whites because it presented itself as a just struggle that could never succeed without the talent, sophistication, and virtue (rather than the money and influence) of white people. The civil rights movement set out to flatter white people, and it succeeded.

For the generation of elite whites that produced critical legal studies, the civil rights movement provided a compelling reason to go to law school. It clothed the legal profession in glamor—a glamor that mysteriously survived the anarchistic impulses of the late sixties and the materialistic impulses of the late seventies. The source of that glamor was an image of lawyers as intelligent and skilled authorities generating a consensus for social change. This glamorous image was not confined to, or even principally associated with, lawyers for the NAACP itself. Indeed, the measure of the NAACP’s success in identifying civil rights with a national consensus was the public identification of civil rights with such leading lawyers for the state as Burke Marshall, Nicholas Katzenbach, Archibald Cox, Ramsay Clark, and Bobby Kennedy, and even with judges, such as Earl Warren and Frank Johnson. Nor was the glamorous image of the lawyer as arbiter of social change necessarily confined to the arena of civil rights: for years the most admired man in

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54. See Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950-1956*, 5 LAW AND HIST. REV. 351 (1987). For further reflections on the contributions of World War II to the climate in which the civil rights movements emerged, see Kellogg, *Civil Rights Consciousness in the 1940s*, 42 HISTORIAN 18 (1979) (effect of World War II was to move focus of civil rights movement from social and economic conditions of blacks to white racism).



America was Ralph Nader. Despite its origins, this glamor seemed to survive even the withering away of the civil rights movement itself.

What it could not survive was the discrediting of the imagery of national consensus on which the civil rights movement depended. During the 1960s, that imagery was challenged or belied in a number of spheres of American life. For the generation of American intellectuals that produced critical legal studies, however, the context in which the myth of national consensus was forever shattered was the Vietnam War.<sup>55</sup> The experience of the Vietnam years fundamentally altered their conceptions of the state, the national political community, the role of the intellectual, and the process of social change.

Prior to the escalation of the Vietnam War, these young intellectuals had viewed the state favorably. They looked upon the state as a force for social change at home and abroad, and as a vehicle for their own influence, prestige, and personal expression. In short, their attitude toward the state was indistinguishable from the attitude of those older intellectuals who planned the escalation of the Vietnam War. The difference was that the war threatened the careers and lives of the younger intellectuals while advancing the careers of the older intellectuals, an intergenerational conflict of interest dramatized quite explicitly on dozens of college campuses. Not only did the state make and enforce decisions contrary to the interests of these young intellectuals, but it failed to respond to their objections, arguments, and protests. They began to perceive the state as corrupt, mechanistic, and impersonal—"the system"—rather than benevolent, rational, and subservient—"our system."

Prior to the escalation of the Vietnam War, young intellectuals identified with other Americans, albeit condescendingly. They tended to think of all Americans as members of a single political community, which they thought of themselves as representing. Public response to the escalation of the Vietnam War undermined these attitudes. The American public became deeply divided and demoralized. While most Americans eventually came to mistrust their government during this period, few showed much appreciation for the protesting college students who initially brought the government's perfidy to their attention. Many Americans were equally hostile toward the government and the protesters, a situation as surprising to the intellectuals protesting the war as it was to the intellectuals planning it. Popular ambivalence toward the antiwar movement convinced the student protesters that the American people did not constitute a political community unified by public rationality.

This absence of political community suggested to the protesters that they

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55. White, *supra* note 12, at 668 (trust in authority of experts, forged in World War II, undermined by Vietnam War).

would also have to adjust their conception of the political role of the intellectual. Student activists could no longer conceive of themselves as authority figures, representing and shaping a popular consensus. Instead, they were forced to recognize that the intellectual was a marginal figure in American political culture. They began to conceive of themselves as gadflies, challenging authority and provoking a public they had once hoped to lead.

As the relationships among the state, the public, and the intellectual changed during the sixties, antiwar students abandoned the consensual model of social change. Their own experience, more than any theory, convinced them that social change could only be the product of conflict, confrontation, even violence. It was, after all, the immediate threat of being drafted that had mobilized many of them into opposition to the war. At campuses like Madison, Berkeley, and Columbia they discovered that confrontation—with its implicit threat of violence—could elicit a coercive response from university or municipal authorities. The consequence, as illustrated by the celebrated documentary, *The War at Home*, was to bring the war home to students, their families and teachers, bystanders, and TV audiences.<sup>56</sup> As more and more people began to perceive themselves as potential targets of state violence, trust in government decreased and opposition to the war mounted. The process by which the antiwar movement grew during those years provided student protesters—and broadcast audiences—with an object lesson in Guevarist social theory.

Politicized blacks learned a similar lesson during the same period. The failure of the civil rights movement to command a consensus among whites became increasingly visible from several perspectives.

In the legal context, the great success of the fifties was the embarrassment of the sixties. Despite an unbroken string of victories in the courts in school desegregation cases, American schools remained segregated by the end of the decade.<sup>57</sup> This partly reflected concerted resistance by whites in many communities, but it also reflected a more diffuse form of resistance that pointed to larger problems.

The biggest barrier facing school desegregation was the persistence and proliferation of residential segregation in urban areas.<sup>58</sup> The 1960s witnessed the first widespread recognition that geographically isolated black ghettos represented an intractable problem. A decade earlier, still denominated

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56. See generally *The War at Home* (Catalyst Films/Madison Production 1979); J. KUNEN, *THE STRAWBERRY STATEMENT* (1969); H. DRAPER, *BERKELEY: THE NEW STUDENT REVOLT* (1965).

57. Baron & Hymer, *The Negro Worker in the Chicago Labor Movement*, in *THE CAPITALIST SYSTEM* 304-05 (1972) (statistics show increasingly segregated school enrollment); S. WILHELM, *BLACK IN WHITE AMERICA* 44-60 (1983) (study showing that blacks' principal social dealings are with other blacks). See generally R. FARLEY, *BLACKS AND WHITES: NARROWING THE GAP?* (1984).

58. R. FARLEY, *supra* note 57, at 32-35.

slums, these neighborhoods had seemed to be more a matter of decaying buildings than of decaying society. Planners confidently expected "slum clearance" to do away with them.<sup>59</sup> By the 1960s it was clear, however, that ghettos were a social rather than an engineering problem. Middle class whites were leaving city centers in droves, largely to get away from "crime," by which they meant blacks, particularly blacks in their children's schools.<sup>60</sup> The negative consequences of "white flight" went well beyond the resulting resegregation of the schools. Whites took businesses and jobs with them, to the suburbs, to the sunbelt. The economic boom of the 1960s only served to dramatize the tremendous inequality of wealth between whites and blacks that white flight protected.<sup>61</sup>

The interrelated phenomena of black "ghettoization" and white flight convinced many blacks that the civil rights movement had been fundamentally misguided in three respects: its commitment to consensus politics, its reliance on legal strategies, and its nonviolent posture.

White flight demonstrated, of course, that the civil rights movement's effort to overcome white racial prejudice had not succeeded. In addition, white flight suggested that the effort had been doomed from the outset. The strategic basis for the effort was the belief that most whites identified strongly with a national political community and felt constrained to conform to whatever that community's authority figures identified as public rationality. Civil rights leaders had hoped that if blacks were authoritatively defined into the political community, they would be accepted by whites. The phenomenon of white flight, however, showed that the commitment of most whites to consensus was illusory. Richard Sennett has persuasively argued that this phenomenon reflected the unwillingness of the postwar middle class to participate in a public world characterized by any complexity, let alone racial diversity.<sup>62</sup> They responded to the intensified pressure to conform by reducing their exposure to public life. The flight to the suburbs revealed that private rather than public rationality would shape the choices of whites. The political community to whom the civil rights movement appealed simply did not exist.

The economic stagnation that accompanied white flight suggested that the emphasis of black leaders on legal rights had also been misguided. Blacks had won a succession of rights against intentional discrimination in the courts and Congress, but were not significantly better off in economic terms

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59. See generally O. NEWMAN, *DEFENSIBLE SPACE* (1973); R. SENNETT, *THE USES OF DISORDER* (1971).

60. See generally R. SENNETT, *supra* note 59.

61. Baron & Hymer, *supra* note 57, at 303-04 (discussing contributions of white flight and residential segregation to unemployment and undercompensation among urban blacks).

62. R. SENNETT, *supra* note 59.

than they had been ten years before.<sup>63</sup> The emphasis on rights rather than resources had been calculated to woo white opinion leaders. It was designed to flatter them into promoting the interests of black people without overtly challenging their wealth and power. By the late 1960s some blacks began to feel that the strategy of exploiting white elites had backfired; white opinion leaders had accepted black assurances that the civil rights movement was harmless because those assurances were, in fact, true. When less patient blacks pressed a more concrete agenda, they were often abandoned or even corrected by their white allies.<sup>64</sup> The civil rights movement had succeeded in glamorizing its white sponsors but brought blacks little, not even a political movement they could call their own.<sup>65</sup>

The phenomenon of white flight showed blacks that they could not expect whites to share their advantages voluntarily. Appealing to the public conscience of white Americans was hopeless if America lacked a public conscience; appealing to authority was useless if it only aggrandized white authority figures. Black communities began to suspect that the closing of a segregated school might mean a loss of employment and authority for black educators, with no compensatory improvement in the future opportunities of black school children.<sup>66</sup> From the middle 1960s, blacks resumed wondering, as they had many times before the 1950s, how they could empower themselves.<sup>67</sup> "The only way anybody eliminates poverty in this country," announced Stokely Carmichael, "is to give poor people money. You don't have to headstart, uplift, and upward bound them into your culture. Just give us the money you stole from us, that's all."<sup>68</sup>

This concern precipitated the community control movement, a surge of interest in Black Islam, and a new emphasis on economic independence. But it also precipitated a reexamination of one of the civil rights movement's most inspiring values: nonviolence. For in the bitter experience of white

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63. And still are not. See generally R. FARLEY, *supra* note 57; S. WILHELM, *supra* note 57; MINORITY REPORT (L. Dunbar ed. 1984).

64. See J. DREYFUSS & C. LAWRENCE, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 141-61 (1979) (tracing uneasiness and subsequent withdrawal of white liberals from civil rights coalition in response to black calls for political power and economic equality).

65. See *Interview with Huey Newton*, in *BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY* 495, 502-03 (1971) (Huey Newton decrying white control of Student Nonviolent Coordinating Committee (SNCC) as denying blacks their own political self-determination).

66. A. ADAIR, *DESEGREGATION: THE ILLUSION OF BLACK PROGRESS* 75 (1984); Mayer, *The Full and Sometimes Very Surprising Story of Ocean Hill, The Teachers' Union and the Teacher Strikes of 1968*, in *BLACK PROTEST IN THE SIXTIES*, *supra* note 51, at 169 (struggle for representation on local school board between predominately black neighborhood residents and predominately white teachers' union in New York City).

67. See generally H. CRUSE, *BEHIND THE BLACK POWER SLOGAN: REBELLION OR REVOLUTION?* 193-258 (1968) (offering perspectives on direction of black power movement; socialist or capitalist, radical or accommodating).

68. G. OSOFSKY, *THE BURDEN OF RACE* 634 (1967) (quoting Chicago speech).

flight there was one encouraging lesson—if whites had no affinity for blacks, at least they were *afraid* of them.<sup>69</sup> This meant that blacks, for all their deprivation, had at least one political resource the civil rights movement had deliberately overlooked. Experience taught ghetto dwelling blacks that the most compelling arguments for nonviolence were prudential rather than ethical. Deprived blacks—like students threatened with conscription—had little to lose by engaging in violence. “I find,” Malcolm X reported, “that you can get a whole lot of small people and whip hell out of a whole lot of big people. They haven’t got anything to lose and they’ve got everything to gain.”<sup>70</sup>

This was a lesson that the courageous young activists of the Student Non-violent Coordinating Committee learned the hard way. Venturing into the deep South to challenge segregation and disenfranchisement, they found themselves the targets of persistent police and vigilante violence. Soon, passive resistance seemed no safer a strategy than self-defense.<sup>71</sup> This had been intuited by urban blacks more often than it had been articulated; history shows that this country’s urban “race riots” typically have been precipitated by police violence.<sup>72</sup> Participation in the urban riots of the sixties was widespread among young ghetto males, according to the Kerner Commission, and was condoned by their elders.<sup>73</sup> The looting and burning that characterized these riots primarily targeted exploitative white owned businesses.<sup>74</sup> It was, in short, political protest.<sup>75</sup>

If ghetto dwellers felt they had little to lose from a strategy of violence, black leaders discovered they had much to gain. James Button credits these riots for the billions of dollars appropriated to the “War on Poverty” in the late sixties and early seventies.<sup>76</sup> Stephen Steinberg credits the riots with inspiring affirmative action recruitment of blacks by edgy corporate employ-

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69. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 153 (1978) (discussing discovery by blacks that whites are afraid of blacks). For an ironic account of the consequences of this insight, see T. WOLFE, RADICAL CHIC AND MAU-MAUING THE FLAK CATCHERS (1971).

70. G. OSOFSKY, *supra* note 68, at 602.

71. F. PIVEN & R. CLOWARD, *supra* note 51, at 252-53 (wounding of James Meredith while peacefully protesting leads some young civil rights leaders to denounce nonviolence); Roberts, *The Story of Snick: From Freedom High to Black Power*, in BLACK PROTEST IN THE SIXTIES, *supra* note 66, at 139 (describing transformation of SNCC from cooperation and nonviolence to confrontation and agitation).

72. See generally A. WASKOW, *supra* note 52, at 255-59 (1964 race riots in New York, Jersey City, Rochester, and Paterson triggered by police brutality).

73. S. STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY AND CLASS IN AMERICA 215 (1982) (quoting Kerner Commission on Civil Disorder).

74. For material on the exploitative practices of ghetto businesses during this period, see Baron & Hymer, *supra* note 57, at 294.

75. R. FOGELSON, VIOLENCE AS PROTEST 22 (1971) (riots an articulate protest against segregation and oppression); T. HAYDEN, REBELLION IN NEWARK (1967) (riots characterized as people making history by taking charge of their own fates).

76. J. BUTTON, BLACK VIOLENCE 161-63 (1978).

ers.<sup>77</sup> These themes coalesced in the recruitment of blacks to staff the new, publicly funded social welfare programs.<sup>78</sup> Whatever the long-term effects, violent protest produced concrete short-term benefits for blacks that nonviolent protest had failed to produce. "As Button observed [in *Black Violence*], the tendency among social scientists to be philosophically opposed to violence and to believe in the possibility of peaceful change has deterred them from even asking whether violence in specific situations might function as an instrument of social change."<sup>79</sup> The predicament of black Americans in the 1960s forced them to confront this question. Their resulting experience convinced some of them that the answer to this question was "yes." Some may find this answer cynical, but for those who risked their lives and liberty to stand up for what we all know is right, this answer was the expression of a courage and commitment that too few have.

These then, were the experiences that shaped the Critics' understanding of social change. Not all of them experienced these events directly. Many of those who most feared and resisted the draft were not active in the earlier civil rights movement—and vice versa. Sadly, almost no critical legal scholars were in a position to be anything more than sympathetic observers of the black power movement. Many of the more recent adherents of critical legal studies were too young to take a very active role in any of these movements, although an increasing number have contributed insights earned on the front lines of the more recent women's movement.

The backgrounds of critical legal scholars vary—more by age than by race, sex, or class. Nevertheless, I would insist that the experiential base of critical legal studies lies in the social movements of the sixties, regardless of the particular experience of any given critical legal scholar. The aspects of this drama not experienced directly were experienced vicariously and imaginatively understood. Whether born in the baby boom or before, the critical legal scholars mostly followed the same political odyssey at roughly the same time. In 1964, whether third-graders or "3Ls," critical legal scholars expected to go at least part of the way with LBJ. By the time of the Tet offensive, they were likely to have become deeply cynical about government but utopian about society. They saw a connection between the student movement—whether they were students or not—and the release of their own capacities for self-expression. By the time Nixon resigned, however, they were profoundly alienated from American society as well as from its government. Some moved further to the left in response to this alienation; others became alienated as they saw their compatriots sliding to the right. All now recog-

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77. S. STEINBERG, *supra* note 73, at 216.

78. F. PIVEN & P. CLOWARD, *supra* note 51, at 254-55.

79. S. STEINBERG, *supra* note 73, at 218 (citing J. BUTTON, *supra* note 76).

nized that they were on the extreme "leftward fringe," not only of the legal academy but of American life.

For one small but significant group within critical legal studies, such alienation was a fact of life that preceded the social movements of the sixties. For the children of the old left, raised amidst the great terrors and small indignities of McCarthyism, the state had never been a friend and American society would never seem secure. Though few in number, such "red diaper babies" were an important element in the formation of critical legal studies because they brought to the group a fluency in Marxist discourse that many of its members lacked. For them, "Mensheviks," "crisis," and "praxis" were as familiar as "schmendricks," "tzouris" and "taxes," and "materialism" had always meant more than a Bloomingdale's charge card. Their deeply rooted suspicion of idealism kept critical legal studies from getting lost in its own fog and helped link critical legal studies to an earlier radical tradition.

Despite its long pedigree, the radicalism of the red diaper babies turned out to be surprisingly similar in sensibility to that of their peers. For both groups, the student movement was in part an intergenerational struggle—in some cases against old left parents, in other cases against New Frontier<sup>80</sup> teachers. In embracing the left, of course, the old left's young identified with their elders; however, in attacking the state—the very state that had persecuted their parents—they also scorned their parents' faith. To reject the state as a vehicle for progressive social change was to reject the "democratic centralism" of Stalin as well as the welfare state of Roosevelt. After all, there was a time when these two leaders were allies, and communist parties throughout the world, under the guidance of Stalin, hailed Roosevelt's policies as steps toward world socialism.<sup>81</sup> Young liberals could hardly have felt a greater sense of betrayal on being drafted to die in Vietnam than old leftists did on being blacklisted. The suspicion of institutions that marked the new left was born of both epiphanies. Individual experience may determine when each of us will find the courage to march; but the culture will plot our direction for as long as the government builds the roads. A few members of critical legal studies may have encountered the totalitarian implications of cold war liberalism earlier than others, but they all trod the same rocky path.

Somewhere along this path, each of them stumbled over a legal education. Most began life relatively well off, if not actually destined for membership in

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80. "The New Frontier," history's designation for Kennedy's program, was more image than substance from its inception. Kennedy introduced it to the nation in his acceptance speech at the 1960 convention, proclaiming, "The New Frontier is not a set of promises, it is a set of challenges." The phrase evoked and evokes cold war liberalism at its most optimistic and imperialistic. The best portrait of the era is still D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972).

81. See F. SCHURMANN, *THE LOGIC OF WORLD POWER* 72-74 (1974) (international left's optimistic impression of U.S. during and after World War II); *id.* at 16, 68 (Stalin disbands Comintern and U.S. Communist party after alliance with Roosevelt).

the ruling elites. They were ambitious and sometimes self-important. Their commitment to social change had been inspired initially by sympathetic observation of, and identification with, the struggles of black people for equal justice. Their own experience in social activism was most likely to have come in preventing themselves or their friends from being drafted. This experience convinced them that the consensus politics of the civil rights movement rested on illusion—that social change required confrontation, risk, even violence. When, as law students, lawyers, or legal scholars, their attention returned to the problems of black people, they found their own experience confirmed—confrontation and violence had been more effective than civility and conciliation. They were taught in law school to think of social conflict as an engineering problem for legal experts—but their own experience and observation of social conflict taught them it was not resolvable by “neutral principles,” “reasoned elaboration,” or the “balancing” of “legitimate interests.”

Critical legal studies was born of this dissonance between the student political experience of the sixties and the law school curriculum of the sixties and seventies. This dissonance was differently experienced in the lives of different incipient critics.

Some were student activists in the sixties and attended law school after the antiwar movement had run its course. For them, law school was a cultural anachronism, a strange Sunday school in which the discredited values of authority and consensus were piously intoned and acted out by people smart enough to know better.<sup>82</sup>

Some of those who later swelled the ranks of critical legal studies were too young for the draft. Graduating from college in the middle to late seventies, they went to law school out of a sense of despair and frustration: political activism was dead, academic careers were foreclosed, careers in the arts were too risky in a time of recession. The future they had looked forward to as sophisticated children of the sixties was gone before they ever got to it. What you can't beat you might as well join, but no one said you had to enjoy it. They hated law school before they attended a single class.

But the founders of critical legal studies for the most part graduated from college before the antiwar movement gained momentum. In many cases

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82. Philip Johnson offers the following unenthusiastic defense of liberal neutrality as a guiding principle for legal scholarship:

Possibly bringing the value conflicts into the open, and acknowledging that we do not know how to solve them, would have disastrous consequences. Fear of such consequences might reasonably lead some who think they see through the false pretenses of liberal rationalism to pretend to believe in it anyway, in the manner of agnostics who send their children to Sunday School.

Johnson, *supra* note 12, at 279.



these founders made the decision to attend law school before disillusionment with the state became widespread. Then, while they were in law school, all hell broke loose. For them, I suspect, professional education and political experience were most acutely dissonant because while their teachers interest-balanced the forum—Washington Square, Harvard Square, Sproul Plaza, and especially the New Haven Green—burned. These young law students had already committed themselves to careers as professional bureaucrats at a time when careers were suddenly irrelevant and bureaucracy illegitimate. If some of them were already too old to feel personally threatened by the draft, they nevertheless shared the undergraduates' profound sense of alienation from their teachers. The staid, professional education the law students were receiving was not only at odds with the party going on elsewhere on campus, but it prevented them from joining it. Going to law school in the late sixties was like having to go to summer school while your friends were all out playing ball.

We can better understand the empirical base and practical import of the critical legal studies critique of legal doctrine if we dramatize it as an intergenerational struggle. The incipient Critics had a very different experience with American political life than did their teachers and senior colleagues; therefore, they rejected their elders' assumptions about American political culture and the American political process.

What were the seminal political experiences of the older generation, the experiences that shaped the law school curriculum and legal scholars of the sixties and seventies?

The central event, experienced directly by some of the most senior scholars and vicariously by the rest, was the New Deal and its attendant struggle between Court and Congress. This struggle was understood at the time, and has been understood by most legal scholars ever since, as a struggle between the political process and the market. The market was egotistic, competitive, and coercive. Because it concentrated decisionmaking power in the hands of a few, it was antidemocratic and unfair. The political process, by contrast, was majoritarian, democratic, and fair. It diffused decisionmaking among large numbers of people. The typical product of the political process was legislation enabling the majority to regulate the market. Judicial review of legislation was understood to involve protection of the market from political regulation. Judges that engaged in judicial review claimed that their decisions were fair or "neutral," because they were derived from principle rather than political expediency. Legal scholars countered that those principles favored the market, which was inherently unfair. Because judicial review was identified with protection of the market, it was seen as illegitimate. The opposition between markets and political processes, basic to post-war political

science,<sup>83</sup> was expressed in the law schools as an opposition between judicial review and legislation.<sup>84</sup>

A second formative experience was World War II and its aftermath. I have already discussed a major effect of this experience on American intellectual life: the rise of a culture that especially valued national conformity and scientific authority. This cultural climate made possible a partial rehabilitation of legal reasoning and adjudication in the law schools. For the legal scholars of the New Frontier, the opposition between politics and law that had emerged in the New Deal era could be mediated by political culture. Legal scholars shared with the political scientists of this period<sup>85</sup> a new understanding of the political process. The political process represented not so much the will of an aggregation of particular people, but an authoritatively defined national political culture,<sup>86</sup> a national mission. That culture stressed unity, equality, fairness, and rationality. The function of the political process was therefore rational and fair decisionmaking, rather than simply a fair aggregation of subjective preference.

Once this conception of the political process was accepted, judicial review could be reconciled with the political process. Legal scholars began to identify adjudication with the "process values" stressed by the political culture. By identifying Nazi genocide with irrational arbitrariness (rather than, say, scientific rationality), post-war legal scholars implied that the War was fought and won in defense of the rule of law.<sup>87</sup> Because judicial decisions now represented the conformist political culture rather than the controversial ethic of the marketplace, they were appropriately "neutral." Application of this standard of neutrality did not require that values advanced by judges be "objective" or "true," provided that those values were supported by a social consensus. Since the conformist culture led people to assume that the values of most people were (or should be) shared by all, neutral decisionmaking involved the identification and implementation of the values of normal people. Typically, this was expressed in terms of the identification and balancing of "legitimate interests."<sup>88</sup> From the perspective of New Frontier legal scholars, it made little difference whether judges could perform this task

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83. See generally C. LINDBLOM, *POLITICS AND MARKETS* (1978).

84. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. ELY, *DEMOCRACY AND DISTRUST* (1978); J. CHOPER, *THE SUPREME COURT AND THE NATIONAL POLITICAL PROCESS* (1979).

85. See generally A. ALMOND & S. VERBA, *THE CIVIC CULTURE* (1963).

86. See generally *id.* (demographic surveys of United States, Great Britain, West Germany, Italy, and Mexico analyzing political participation).

87. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

88. Including the "interests" of the political process itself. See Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383, 434 (1979) (concept of "interest" used in legal reasoning to mediate irreconcilable categories); see also A. KATZ, "BAL-

with precision, so long as they did so with properly humble sincerity. Adjudication was simply one part of a complex "process" of information gathering. The ultimate outcomes would be shaped by a culturally determined political consensus.

Much of the curriculum designed by the New Frontier or "legal process" scholars could be characterized as the ritual humiliation and rehabilitation of judicial review and of legal reasoning generally. Yes, judicial review was countermajoritarian and had been abused; however, courts were especially competent to ensure the "rationality" of the political process. One of the principal occasions for the celebration of judicial review in the legal process curriculum was the teaching of civil rights decisions in constitutional law.

This was where the generations joined battle. In the eyes of the legal process scholars, the civil rights movement represented a triumph of public rationality and a moral vindication of their chosen careers. In the eyes of the young Critics, the civil rights movement was a disappointing failure that had been premised on a conception of American politics they abandoned as naive. For this reason, the entire drama of the legal process curriculum, with its veneration of the political process and its mortification and ultimate vindication of judicial review, had a very different meaning for the Critics than the one intended by their teachers. After witnessing the duplicity of numerous authority figures during the Vietnam years, the Critics simply could not believe that their teachers were expending all this energy to convince them that the little bit the courts had done for black people was justifiable. They suspected that the whole effort was an elaborate charade designed to persuade them and the imaginary black clients they had brought with them to law school, to forego violent confrontation in favor of a futile strategy of litigation and conciliation.

To the Critics, the ritual veneration of the political process was a cruel joke. In their experience, the distinction between politics and markets, inherited by their teachers from the New Deal, was meaningless. To them, American politics was a vicious struggle of contending interests in which outcomes were determined by power and wealth rather than by majority will. To the extent that less privileged people acquiesced in these outcomes, their consent was purchased or coerced. In short, the political process could not restrain or regulate the market—it was the market. This meant that impoverished, disempowered blacks could never hope to increase their wealth or power through the political process, because the results of the political process were determined by the distribution of wealth and power.<sup>89</sup> To the Critics this

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ANCING" IN THE PUBLIC INTEREST 18 (1987) ("balancing" of "interests" amounts to discipline involving the social construction of normality and deviance).

89. For an exploration of these issues from a variety of perspectives, see Bell, *The 1983 McCormick Mitchell Lecture—A Hurdle Too High: Class-Based Roadblocks to Racial Remediation*, 33

was axiomatic. New Deal Democrats might lament it; neoconservatives had emerged to celebrate it; but after the election and reelection of Richard Nixon, everyone knew it: the market and the political process were both part of the same corrupt system.<sup>90</sup>

Accordingly, the Critics assumed that the next act in the drama, the mortification of judicial review, was meant to be ironic. Surely the elaborate apologies for the "countermajoritarian" character of judicial review were not meant to be taken seriously. The Critics suspected that legal scholars who lamented the "fact" that adjudication wasn't more like the political process were really fishing for compliments: the courts, they were implying, weren't part of "the system."

This suspicion was confirmed by the final act in the drama, the vindication of judicial review. At this stage of the drama, it became clear that the players didn't really think adjudication was so bad. In fact, they implied that it was better than the political process—or at least better than the Critics' image of the political process. They claimed that adjudication provided the underprivileged with a neutral forum, isolated from the pressures of the marketplace, in which their interests would count as much as anyone else's. To the Critics, this implied that black people didn't need wealth and power in order to have their interests looked after. The legal doctrine and constitutional theory taught in law school thus seemed to *legitimize* an unfair distribution of wealth and power.

Moreover, the Critics' own observations of American society belied the claims made by the law school curriculum. Blacks had not realized their aspirations through the legal system, because those aspirations included the acquisition of wealth and power. The courts could not redistribute wealth and power because that was a political function, one that was inappropriate for a nonrepresentative institution. The Critics began to suspect that this was what their teachers really meant when they said that the courts were different from the marketplace. Their teachers were really saying that the courts were insulated from wealth and power in order to justify the courts' failure to redistribute wealth and power. Once again, the legal process scholars seemed to argue that any distribution of wealth and power generated by the market and the political process was *legitimate*. The interest of blacks in redistribution of wealth and power was not a "legitimate interest." Insofar as law professors admitted that blacks would not achieve redistribution of wealth and power through the courts, their claim that blacks could protect

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BUFFALO L. REV. 1 (1984) (symposium with opening lecture delivered by Prof. Derrick Bell and replies by Profs. Monroe Fordham, Alan Freeman, and Sidney Wilhelm followed by questions from audience).

90. See Parker, *The Past of Constitutional Theory—And its Future*, 42 OHIO ST. L.J. 223, 242-44 (1981) (discussing relation between economic status and political participation in U.S.).

their interests through the courts was revealed to be *ideology*—that is, false. The apparent truth of the claim depended upon the power of the courts to define which interests counted as “legitimate.”

That courts were no more effective than the political process as vehicles for the social advancement of the underprivileged suggested to the Critics that the courts were no fairer than the political process. Their teachers defended the decisions of the courts on the grounds that they accurately reflected consensus values. To the Critics, this response sounded disingenuous. Their own political experience had convinced them that American political culture was characterized by conflict rather than consensus. Moreover, they were fairly confident that by the 1970s, this perception of American political culture was fairly widespread. Accordingly, they were convinced that the values employed by the courts to decide cases could not command the support of the entire society. How, the Critics wondered, could the courts and their defenders justify the claim that the principles by which they decided cases represented a consensus that did not, in reality, exist?<sup>91</sup>

The answer that the Critics discovered was that the courts consistently invoked contradictory principles, each of which embodied the interests of opposing groups. Thus the courts could uphold economic regulation on the ground that an unregulated market was unfair;<sup>92</sup> strike down racially discriminatory legislation on the ground that the political process was unfair;<sup>93</sup> but uphold legislation that discriminated on the basis of wealth on the ground that the results of a politically regulated market were fair.<sup>94</sup> By picking and choosing from among opposing principles, the courts could reach opposing results on any controversial issue. Because legal doctrine provides courts with opposing principles, the Critics concluded, legal doctrine is *indeterminate*. But because courts invoke these opposing principles, they appear to have taken all viewpoints into account. Thus *indeterminacy* serves an *ide-*

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91. See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (comparison of interpretivism and neutral principles with political philosophy of liberalism, arguing that development of consensus of meaning would destroy liberal individualism).

92. E.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (state statute fixing minimum wage for women upheld).

93. *Hunter v. Erickson*, 393 U.S. 385 (1969) (local racial housing ordinance denied equal protection); see *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail those political processes ordinarily relied upon to protect minorities”).

94. *Maier v. Roe*, 432 U.S. 464 (1977) (state regulation excluding use of Medicaid benefits for nontherapeutic abortions upheld); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (rezoning decision with socially disproportionate impact upheld in absence of proof of discriminatory motive); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (state school financing system with adverse impact on poor upheld).

*ological* function, creating the illusion that judicial decision reflects a political consensus.

The claim that judicial decisions are authorized by a political consensus serves a further *ideological* function. It reinforces the illusion that such a consensus exists. And this last illusion fulfills an important *legitimation* function: if the actors in American politics are directed by shared values rather than opposing interests, then it is conceivable that the political process will transfer wealth and power from those with more to those with less. If the political process will lead to the empowerment of the weak and the enrichment of the poor, then the poor and weak have no need to use or threaten violence in order to achieve justice.

Now, it may appear that I am saying that arcane legal doctrine persuades poor, oppressed people to accept their situations. But I am saying no such thing. I agree with the left skeptics that such people do not read court opinions or legal treatises. Legal doctrine is produced for consumption primarily by the powerful rather than the powerless. Moreover, I agree that oppressed people aren't induced to accept their situations by legal doctrine, although there is evidence that poor people are influenced by popular versions of a similar ideology.<sup>95</sup> Primarily, oppressed people are induced to accept their situations by coercion or the fear of it. Coercion is applied by powerful people. Some powerful people apply it because they perceive that to be in their interest. Some powerful people apply coercion because they think it is morally justified—probably for many powerful people, the two criteria are inseparable. Legal ideology does not legitimate inequality for its victims—it legitimates inequality for its beneficiaries. It helps its beneficiaries believe their society meets the needs of the powerless. Accordingly, it also helps them believe that the powerless are not justified in using or threatening violence to seize some of the power. This provides—for those powerful people that need it—a justification for vigorously repressing confrontational behavior on the part of people without power. They can tell themselves that the application of such coercion in no way impedes powerless people from realizing their aspirations.

Let me offer an example of this sort of legitimation from the related context of academic sociology. Just as powerful people are the primary consumers of legal thought, they are the primary consumers of social science research. Since the late 1960s, neoconservative sociologists have been arguing, with increasing crudeness, that the differential social mobility of ethnic

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95. See generally M. BURAWY, *MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM* 109-20 (1979); O. LEWIS, *supra* note 22; E. LIEBOW, *supra* note 22; L. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 336-449 (1979); R. SENNETT & J. COBB, *supra* note 22; W. SEWALL, *WORLD AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848* (1980).

groups in America has been determined by differences among the cultures of those groups. Thus ethnic groups that became economically and politically assimilated were able to do so because of their middle class values. Black people, however, failed to do so, because of a lack of "achievement-orientation" rather than because of racial discrimination or economic disadvantage.<sup>96</sup>

Now the first thing I would like you to notice about this argument is its similarity to the ideology embodied in legal doctrine: it vindicates an institution—in this case the market—by invoking a cultural consensus—in this case middle class values. It presents this cultural consensus as a potential avenue for black advancement, while lamenting black deviance from that consensus.

The second thing I would like you to notice about this argument is that it implies that the failure of blacks to achieve material and political equality in American society is their own fault.<sup>97</sup> Now this ideological claim can be used in a number of ways. Directed at blacks themselves, it can be used to convince them to accept their situations, and I suspect that it is being used in this way today. But the initial audience for this ideology consisted of powerful whites who could be persuaded that blacks needed no affirmative economic assistance. Thus persuaded, powerful whites became increasingly confident that confrontational demands for redistribution of wealth and power were illegitimate, and that intransigent and even violent responses to such demands were legitimate. And lo and behold, blacks, despite their continuing deprivation, have ceased framing such demands. I don't think this is because they are convinced that this deprivation is their own fault—I think it may be because they know that powerful whites believe that their condition is their own fault. People will risk violence when they believe they have little to lose by it, so long as they think they have something to gain by it. The current ideological climate among the ruling class has convinced blacks that confrontation will be not only dangerous (it always is), but fruitless as well.

Here then is the Critics' beef against the ideology embodied in legal doctrine and legal scholarship: it encourages those in power to punish violently the one strategy that offers oppressed people any realistic hope of improving their lot. This conclusion is not based on social scientific research, but it is rooted in experience. The belief that confrontation with its attendant risk of violence is the only realistic strategy for achieving social change in contemporary America is a product of the Critics' own experience and observation

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96. See generally E. BANFIELD, *THE UNHEAVENLY CITY REVISITED* (1974); N. GLAZER & P. MOYNIHAN, *BEYOND THE MELTING POT* (1970); T. SOWELL, *RACE AND ECONOMICS* (1976); ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS (T. Sowell ed. 1978); Glazer, *Slums and Ethnicity*, in *SOCIAL WELFARE AND URBAN PROBLEMS* 84 (T. Sherrard ed. 1968).

97. See W. RYAN, *BLAMING THE VICTIM* (1971) (theories and programs designed to eradicate poverty, poor education, or racial injustice by reforming character or culture of victims actually stigmatize and dominate them).

of American politics. The belief that legal doctrine and legal thought are used to persuade American leaders otherwise is a product of the Critics' own encounters with their teachers and senior colleagues in elite American law schools. The question raised by the skeptics, which the Critics must address, is what the Critics hope to accomplish by exposing and attacking that ideology.

Any candid answer to this question must begin with the admission that the aims of critical legal studies are modest. The Critics do not hope to redistribute power and wealth in American society through changes in the courts or in legislation. Their own understanding of American politics convinces them that courts and legislatures will not redistribute wealth and power without the consent of the holders of wealth and power. Nor do they expect, by themselves, to persuade the holders of wealth and power to relinquish them. The Critics' theory of social change convinces them that legal or policy arguments are not likely to be effective in achieving social change, and that is why critical legal scholars have produced few novel legal theories or legislative reform proposals. In their eyes, litigation and lobbying cannot produce social change. Only confrontation can.

Poverty lawyers have sometimes complained that critical legal scholars disdain the representation of poor people and demean the already underappreciated poverty lawyer as a dupe of the ruling class. I think this complaint reflects a misunderstanding of the behavior of critical legal scholars. The Critics are interested in facilitating social change. In their eyes, the representation of poor people is a worthy task because it enables poor people to hold on to the limited resources they already have. But it is unlikely to result in redistribution of resources, and that is why most Critics don't do it. There are two settings in which, under the assumptions made by critical legal scholars, the legal representation of poor people could contribute to social change. One setting is the representation of groups. Here lawyers can sometimes function as organizers, encouraging poor people to confront adversaries directly rather than merely through the courts. Some critical legal scholars have engaged in and have written about this kind of legal practice.<sup>98</sup> A second setting is the criminal defense of those poor people who are prosecuted for civil and uncivil disobedience.<sup>99</sup> This type of practice can help sustain and protect a movement for social change once it is underway—but it can rarely instigate one.

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98. E.g., Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 483 (1984) (quoting Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 119 (1977)).

99. Rabinowitz, *The Radical Tradition in the Law*, in *THE POLITICS OF LAW*, *supra* note 21, at 310.



How then, do critical legal scholars hope to instigate social change? If they believe that social change can only come through confrontation and the threat of violence, and yet they wish to instigate social change, one might suppose that they intend to engage in confrontation and violence. Yet they have not done so and will not do so. The reason they will not do so is very simple—they're scared. This is also the reason that most people don't engage in confrontation politics. Even the most destitute, desperate people seldom engage in confrontation politics, because it is extremely dangerous. But critical legal scholars are neither destitute nor desperate. They are privileged, comfortable, sometimes even well off and influential people. They have little to gain from the confrontation politics and much to lose. Critical legal studies simply is not a movement of oppressed people, because its members are not sufficiently oppressed—and most of them prefer it that way.

This claim requires some clarification in light of the insistence on the part of some leading critical legal scholars that they are oppressed. Drawing on the intellectual tradition of existential Marxism,<sup>100</sup> Duncan Kennedy and Peter Gabel have stressed the feelings of alienation, loneliness, and fear that afflict even privileged people in "bourgeois society."<sup>101</sup> They have also articulated the frustrating impotence experienced by people whose privileged leadership roles ironically prescribe their every move.<sup>102</sup> These complaints echo the sense of self-estrangement expressed by elite students during the Vietnam years. This sense of estrangement was not confined to the rice paddies of selective service<sup>103</sup> but flowed across what critical legal scholar Karl Klare is wont to call "the entire existential space of everyday life,"<sup>104</sup> a purgatory protested by Peter Gabel's Harvard classmates in the following terms:

Strike for the eight demands. Strike because you hate cops. Strike because your roommate was clubbed. Strike to stop expansion. Strike to seize control of your life. Strike to become more human. Strike to return Paine Hall scholarships. Strike because there's no poetry in your lectures. Strike because classes are a bore. Strike for power. Strike to smash the Corpora-

100. See generally M. POSTER, *EXISTENTIAL MARXISM IN POSTWAR FRANCE* (1975).

101. Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1567-76 (1984); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979).

102. E.g., D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

103. Alan Freeman escaped the draft by working in the Air Force bureaucracy after law school, a job he describes as "the ultimate radicalizing experience." Unmediated personal chat with Alan Freeman, Professor, S.U.N.Y./Buffalo Faculty of Law and Jurisprudence (March 1986). For a description of Prof. Freeman's role in the origins of critical legal studies, see Schlegel, *supra* note 13, at 391.

104. Klare, *Two Dialogues on Critical Legal Theory and its Implications for Reconstruction* (discussion with Ed Sparer, followed by discussion between Gerald Frug, Alan Hutchinson, and Patrick Monahan) (Seventh National Conference on Critical Legal Studies, Camden, N.J., Apr. 17, 1983).

tion. Strike to make yourself free. Strike to abolish ROTC. Strike because they are trying to squeeze the life out of you. Strike.<sup>105</sup>

Young Harvard grads like Duncan Kennedy or Mark Tushnet, moving to New Haven for law school in the late sixties, might have wondered whether they had a chance of living authentically as lawyers.<sup>106</sup> If they asked one of their teachers named Charles Reich, he might have told them that young professionals “are role-players. They have an image of what is fitting to their roles. And in choosing the activities and interests that make up their life, they are choosing from sources outside themselves . . . . Their choices need not come out of a popular magazine. They can come out of a sense that a young lawyer has a) political interests, b) cultural interests, c) likes sports, d) does things that are offbeat and in good taste . . . . All of [their] . . . activities have the quality of separateness from self, of fitting some pattern—a pattern already known and only waiting to be fulfilled.”<sup>107</sup> The privileged life of the professional did not seem to offer the kind of freedom for which the Harvard student struck.

Now, I don’t deny that well paid lawyers can be desperately unhappy in corporate-bureaucratic jobs;<sup>108</sup> I don’t deny that legal scholars can feel imprisoned by the very authority society accords them, and I don’t deny that these sorts of suffering resemble the feelings of oppression expressed by privileged students in the Vietnam years. What I do deny is that the oppression experienced by most lawyers and legal scholars is sufficiently severe to induce the sufferers to risk life and limb—or even to give up the roles that cause such suffering. The deprivation Reich describes—an inability to express the authentic self—is experienced as an individual one. It is not the sort of complaint people have traditionally organized to fight against. What distinguished the students of the Vietnam era was that enough of them were sufficiently frightened by their circumstances to undertake the risks of confrontation. The resulting repression generated a movement that provided students with opportunities for community and commitment. They didn’t necessarily set out to overcome their feelings of alienation,<sup>109</sup> but in the course of resisting the draft, students discovered that they could experience

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105. *Strike Manifesto*, LIFE, Apr. 25, 1969, at 35.

106. I make no claim about what any of these scholars actually felt—my goal is to describe the social milieu in which critical legal studies was born and the sentiments that milieu probably induced in many of its inhabitants. Whether or not these two perceptive scholars shared those feelings, I am confident that they were aware that others felt them. This paragraph is *not* based on experience reported to me by either of the individuals named.

107. C. REICH, *THE GREENING OF AMERICA* 81-82 (1971).

108. Brill & Bruck, *Whatever Happened to the Yale Class of 1959?*, AM. LAW., Oct. 1981, at 21 (interview with 30 members of Yale class of 1959).

109. The Berkeley free speech movement could be interpreted as a quest for self-expression rather than a social protest movement, but is more properly understood as an outgrowth of the civil rights movement. See H. DRAPER, *supra*, note 56, at 1-15.

fulfillment in a community that they could not experience individually. Critical legal scholars are nostalgic for such a communal life,<sup>110</sup> but are not, at present, willing to risk much for it. As a result they are very cautious. Not only do they refrain from engaging in confrontation, violence, or even civil disobedience, they also generally refrain from advocating such behavior. That, I believe, is the principle reason why some observers have been led to believe that critical legal scholars have no theory of social change. But it's not that they have none—it's just that they're skittish about articulating it.

I suspect that part of the reason for this caution is that legal scholars are in a position to alleviate some of the most uncomfortable aspects of their oppression at relatively little cost. Academic jobs enable them to escape the most military rigors of bureaucratic employment. They have—slowly and cautiously at first—carved out opportunities for self-expression in their research. There is poetry in their lectures. They have struggled, in their relations with colleagues, students, and secretaries, to avoid the illegitimate use of authority.

All of this has helped critical legal scholars feel less oppressed—but it has not entailed substantial risk, commitment, or even collective activity. It represents a private solution both in the sense that it doesn't require anybody's help and in the sense that it is unavailable to most people in our society. Whatever contribution to social change critical legal scholars are making, they will not make that contribution by pursuing their own liberation. Although critical legal scholars may be oppressed, critical legal studies is not an oppressed people's movement. The old-fashioned way to express this would have been to say that critical legal scholars lack consciousness of themselves as an oppressed class.

That critical legal studies is not an oppressed people's movement is the reason that I see it as quite distinct from feminism. It is also the reason I believe that feminism played a minor role in the initial development of critical legal studies. The other movements I discussed—the civil rights movement, the black power movement, the antiwar movement—were precursors to critical legal studies. Feminism is more of a contemporary. Radical women who were active in—and frustrated by—these other movements in the sixties applied these experiences in the seventies to a movement aimed at overcoming their own oppression.<sup>111</sup> They developed a somewhat different theory of social change, in which violence was often eschewed as a symptom of testosterone poisoning, and emphasis was placed on changing consciousness.<sup>112</sup>

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110. Note the wistful tone in Schlegel, *supra* note 13.

111. See M. WALLACE, *BLACK MACHO AND THE MYTH OF THE SUPERWOMAN* (1978).

112. For discussion of consciousness raising as a technique for personal transformation and social change, see J. MITCHELL, *WOMAN'S ESTATE* 62 (1973); R. MORGAN, *SISTERHOOD IS POWER-*

Now despite this primary emphasis on combatting ideology, the practice of consciousness raising required considerably more courage than the practice of critical legal studies and was more directly related to social change. Consciousness raising could be credibly presented as a method of social change on the assumption that large numbers of women lived in isolation from one another, threatened with domestic violence at home and sexual harassment abroad. For such women, consciousness raising—escaping isolation, assembling together, articulating anger, and finally asserting one's self—would in and of itself involve a dramatic change in social circumstance. It could also lead to confrontation with men and the risk of repressive violence. Partisans of guerrilla warfare assume that violent confrontation can solidify and empower a community because they envision these events taking place in a public arena; but the structure of society dictates that violent confrontation between men and women will most often occur in private, where women may be deprived of community. For feminists, violent confrontation accordingly is the painful cost of social change, not its catalyst.

Yet neither is discussion—as it may be for middle class male academics—a “safe” alternative to social change. To the contrary, for women who are abused and overburdened homemakers, assembly for political discussion and self-expression represents a change in social position purchased at great risk. By contrast, for a group of law professors to assemble for political discussion requires little risk and less social change. The feminist movement can sometimes change society in the very act of discussing ideology to the extent that the movement is composed of people suffering from coerced silence and isolation. Critical legal scholars are not in the same social position, and their conversations, regardless of content, cannot make the same contribution to social change.

So: critical legal scholars don't litigate or legislate, because that won't produce social change. They don't engage in violent confrontation, because that's not worth the risk to them. They don't even incite others to violent confrontation, because that's also dangerous. So what do they do? How does critical legal studies contribute to social change?

What critical legal scholars do is combat ideology. Unlike feminists they do not combat ideology among the oppressed; but like feminists, they combat ideology among their own class—in their case, the ruling class. The ideological beliefs that they attack reassure members of the ruling class that oppressed groups can achieve “equality,” or “justice,” or “freedom” in American society without a massive redistribution of power. Their aim is to persuade people in power that violent protest by underprivileged people in

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FUL xxiii-xxvii (1970); MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, in THE SIGNS READER 6 (1983); Sarachild, *The Consciousness Raising: A Radical Weapon*, in FEMINIST REVOLUTION 144 (1975).

America is rational, justifiable, even inevitable. Their hope is that this may erode the resolve of America's rulers to use repressive force against oppressed people; and the further hope, perhaps Utopian, is that this will embolden such people to take their cause into their own hands. Critical legal scholars are not, after all, guerrillas; they are sympathizers within the *Ancien Regime*. They are not, perhaps, heroes—but they are not as timid as some. If they lack the courage of their convictions, at least their convictions require courage. And I'm afraid—very much afraid—those convictions are true.